84-557

No. 84-____

Office-Supreme Court, U.S.
FILED
OCT 3 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANUEL AGROMAYOR,

Petitioner,

—v.—

SEVERO COLBERG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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8 pp

Question Presented

Petitioner is a journalist who applied for and was offered a job as a press official by the Minority Leader of the House of Representatives of the Commonwealth of Puerto Rico. His employment, though, was never approved of by Respondent, President of the House of Representatives of the Commonwealth of Puerto Rico. Petitioner was not hired because he wrote a newspaper editorial that indicated that the President of the House had acknowledged to an individual, known to Petitioner, that his party was divided over various issues. He was also not hired because Petitioner was not a native-born Puerto Rican.

Was Respondent's refusal to approve the hiring of a press official, who was to be a member, not of Respondent's staff, but of the House Minority Leader's staff, a legislative act, absolutely immune, from

constitutional claims based on 42 U.S.C. § 1983, pursuant to the federal common law immunity accorded state legislators for their legislative acts?

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Citation to Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is thus far unreported and is printed in the Appendix annexed hereto, infra, pp. 1a-24a. The opinion of the United States District Court for the District of Puerto Rico denying Respondent's Motion to Dismiss is reported and appears at 573 F. Supp. 939.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was officially entered on July 5, 1984, infra, pp. 25a-26a.[1/] The jurisdiction of this

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1/ Petitioner has enclosed a copy of a notice relating to entry of judgment which mistakenly indicates it was entered on July 3, 1984. The undersigned was informed by the Clerk of the First Circuit that an order would issue to correct the error. Said order, however, had not been received from the Court of Appeals when this petition was filed.

Court is invoked pursuant to 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

This petition involves Article 1, § 6 clause 1, infra, p. 27a, and the First, Fifth and Fourteenth Amendments of the Constitution of the United States, infra, pp. 27a-29a. The petition also involves, 42 U.S.C. § 1983, infra, p. 30, and Rule VII of the House of Representatives of the Commonwealth of Puerto Rico, infra, p. 31a-33a.

Statement of the Case

Prior to March 14, 1983, a caucus of the New Progressive Party's representatives, from the House of Representatives in Puerto Rico, met and decided to employ Petitioner, Manuel Agromayor as a press official. Mr.

Agromayor, a member of the New Progressive Party, was to be attached to the office of the House Minority Leader, Representative Jose Granados-Navedo. Representative Granados[2/] agreed to pay Mr. Agromayor a monthly salary of $800.00 in exchange for 56 hours of monthly service as a press official. Mr. Agromayor's salary was to be paid from the sum of money he receives from the Puerto Rico Legislature for use by him in his official capacities. Pursuant to Rule VII of the Rules of the House of Representatives of the Commonwealth of Puerto Rico, infra, pp. 31a-33a, Representative Granados prepared a written contract which specified the terms of Mr. Agromayor's employment. He submitted

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2/ Petitioner, in accordance with social custom, will first recite an individual's complete name and thereafter, for the sake of brevity, refer to him or her exclusively by his or her paternal last name.

it on March 14, 1983 to Respondent, Severo Colberg, for his signature. Mr. Colberg is a member of the Popular Democratic Party, which presently claims a majority in both houses of Puerto Rico's legislature.

On March 15, 1983, Mr. Agromayor, a journalist by profession, published an editorial in the "Opinion" section of El Mundo, a Puerto Rican newspaper, infra, p. 34a-40a. The editorial stated that Mr. Colberg had acknowledged to a colleague of Mr. Agromayor's that his party was divided over various issues and that unspecified actions would be taken, after the upcoming elections, to remedy the divisiveness. On March 19, 1983, in an article published, under his by-line, in the "Commentary" section of a newspaper known as El Reportero, infra, pp. 41a-48a. Mr. Colberg denied that he had ever acknowledged

to anyone that his party was divided, or, that actions would be taken after the elections, as Mr. Agromayor had indicated. Mr. Colberg also challenged Mr. Agromayor, in the same newspaper article, to disclose his source, accused him of being a "propagandist" for the opposing political party, and attacked him for being of Argentinian descent.

Five days later, on March 24, 1983, Mr. Colberg returned the employment contract presented to him by Representative Granandos, unsigned. On the same date, Mr. Colberg wrote Representative Granados a letter advising him that he would not sign the contract because of the editorial Mr. Agromayor had published in El Mundo and because he considered Mr. Agromayor to be unqualified to serve as a press official for the House of Representatives, infra, pp. 49a-52a.

On March 30, 1983, Representative Granados met twice with Mr. Colberg to urge him to reconsider his refusal to sign the contract. At those meetings, Mr. Colberg insisted that he had been correct in refusing to authorize the hiring of Mr. Agromayor, citing once again the editorial as the reason for his refusal to sign the contract and, citing the fact that he was not a native-born Puerto Rican, as an additional reason.

On April 25, 1983, Mr. Agromayor filed a complaint pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Petitioner alleged a violation of his constitutionally-guaranteed rights to free speech, freedom of association, freedom of the press, equal protection and due process. On May 25, 1983, Mr. Colberg moved to dismiss Petitioner's complaint on several grounds, including the ground that he was absolutely immune from

Mr. Agromayor's constitutional claims under the federal common law rule relating to immunity for legislative acts. On October 11, 1983, the District Court of Puerto Rico denied Mr. Colberg's motion on the ground that the act complained of, Mr. Colberg's refusal to authorize the hiring of Mr. Agromayor was an administrative act that did not qualify "as an integral and necessary element of the deliberative and communicative process of the legislature protected by legislative immunity." Agromayor v. Colberg, 573 F. Supp. 939, 943 (D.C.P.R. 1983). Respondent appealed the District Court's decision. On July 5, 1984, the United States Court of Appeals for the First Circuit reversed on the ground that Mr. Colberg's refusal to hire Mr. Agromayor was a legislative act entitled to absolute immunity. Manuel Agromayor now respectfully

petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.*

*/ A Petition for Certiorari, raising the same question presented here, but arising from an employment decision made by a United States Congressman, was filed in the Court on October 2, 1984. The Petition is captioned Jones v. Walker.

REASONS FOR GRANTING THE WRIT

I

THE QUESTION PRESENTED HERE IS WHETHER EMPLOYMENT DECISIONS, MADE BY LEGISLATORS, QUALIFY FOR LEGISLATIVE IMMUNITY. THE QUESTION IS SUBSTANTIALLY SIMILAR TO THE ISSUE NOT RESOLVED BY THIS COURT IN DAVIS V. PASSMAN AND REQUIRES CLARIFICATION AT THIS TIME.

The question presented by this controversy is substantially similar to the issue relating to legislative immunity left unresolved in Davis v. Passman, 442 U.S. 228 (1979). In Davis v. Passman, this Court determined that Shirley Davis, a deputy administrative assistant to Congressman Passman who was dismissed by the Congressman because of her sex, had a right to file a claim directly predicated on the Fifth Amendment against the legislator. Congressman Passman argued that his decision to discharge Ms. Davis was an act completely shielded by the Speech or Debate Clause

from suit. This Court, however, in spite of the fact that four of its members thought that the question relating to immunity should have been addressed, chose only to delineate plaintiff's right to file a Bivens action. Id at 249-52 (Berger, C.J., joined by Powell and Rehnquist, JJ., dissenting) (Stewart, J. joined by Rehnquist, J., dissenting). Petitioner submits that this case presents the significant issue left open in Davis v. Passman, and, urges the Court to grant the writ requested because the issue has been decided in a conflicting manner by the District Courts and the Courts of Appeals.

Three Courts of Appeals have decided the issue presented here, inconsistently. The Fifth Circuit in Davis v. Passman, 544 F. 2d 865 (5th Cir. 1977), rev'd on other grounds, 571 F. 2d 793 (5th Cir. 1978) (en banc) held that the Speech or Debate Clause

did not bar Ms. Passman's constitutional claim.

> Such dismissal decisions certainly are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the constitution places within the jurisdiction of either House. Gravel v. United States, supra, 408 U.S. at 625, 92 S.Ct. at 2627. Peripheral or tangential activities of a representative must not be confused with the legislative core. A representative's transgressions are not given absolute absolution. The constitution establishes an immunity for aberrations in a representative's legislative activities but members of Congress become mere mortals when they operate in more mundane fields. When members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decision on matters pending before Congress. The democratic process remains unfettered. [footnote omitted]

544 F. 2d 880. The Court of Appeals for the District of Columbia in another case

involving a federal legislator and an allegedly unconstitutional dismissal held, that the Speech or Debate Clause did not prohibit the former manager of the House of Representatives Restaurant System from a filing a suit, alleging sexual discrimination. Walker v. Jones, 733 F. 2d 923 (D.C. Cir. 1984).

Plaintiff in that case had been employed for approximately ten years before being discharged. Congressman Ed Jones, the then Chairman of the Subcommittee on Services of the House of Representatives Committee on House Administration, and, the then Staff Director of the Subcommittee, Thomas Marshall, alleged that they had effectuated her dismissal "in committee," id at 927. The District of Columbia Court of Appeals, however, held that neither the Congressman's status nor the manner in which

defendants discharged plaintiff insulated defendants' actions from judicial inquiry.

> The key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined [citation omitted] but peripheral activities not closely connected to the business of legislating do not enjoy Speech or Debate shelter.
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> * * *
>
> Selecting, supervising, and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences the shaping or our nation's laws.
>
> Nor do we grasp why consideration or a vote "in-committee" should place all personnel superintendence of auxiliary services of a nonlegislative character inside a "legislative sphere." Assuming arguendo that anything done "in-committee" is necessarily a "legislative act [ ]," see Brief for Appellees at 10, Walker's complaint against Jones and Marshall nonetheless survives a Rule 12(b) motion.

733 F. 2d at 929 and 931.

The First Circuit in this action determined the issue[3/] quite differently. Unlike the Courts of Appeals for the Fifth Circuit and for the District of Columbia, it "decline[d] to inquire deeply into the functions performed by a particular personal legislative aid...[because] such inquiry itself threatens to undermine the principles that absolute immunity was intended to protect." Appendix, infra, p. 19a. The Court of Appeals in this instance did determine that the position of press

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3/ The First Circuit, of course, held Respondent to be immune pursuant to federal common law immunity and not the immunity accorded federal legislators under the Speech or Debate Clause. Federal common law immunity is predicated not on the doctrine relating to separation of powers, but on principles relating to comity and federalism. Lake Country Estates, Inc. v. Tahoe Original Plan, 440 U.S. 391, 403-405 (1979); Tenney v. Brandhove, 341 U.S. 367 (1951).

official, offered to Petitioner by the House Minority Leader provided Petitioner with "enough opportunity for 'meaningful input' into the legislative process such that the employment decision should be immunized [footnote omitted]." Appendix, infra, pp. 19a-20a. Petitioner disagrees with the court's conclusion as well as its analysis.

The Court of Appeals in this case overlooked the significant fact that the Petitioner's employer here was not Respondent, Severo Colberg, but the House Minority Leader, Representative Granados. The Court of Appeals' reliance, therefore, infra, pp. 16a-17a, on Chief Justice Berger's dissent in Davis v. Passman, supra at 249-50, is entirely misplaced. The considerations expressed in Chief Justice Berger's dissenting opinion were directed at preserving a congressman's right, to hire, in an unfettered fashion, his own

staff members not the staff members of representatives who belong to opposing political parties. The First Circuit's concern that this lawsuit threatens to interfere with a Puerto Rico's House member's right to select suitable assistants, who "'must be treated as the... [House member's] alter eg[o]...'" is based on an incorrect premise. Appendix, infra, p. 19a. Petitioner here was not seeking employment from Respondent but from the House Minority Leader; and, Respondent was not acting here as Petitioner's prospective employer but as the chief executive officer of Puerto Rico's House of Representatives. The act complained of here, then, is not legislative in nature but a purely ministerial act. The First Circuit's judgment, therefore, should be reviewed by this Court because it mistakenly holds that legislative immunity shields actions that

are exclusively partisan and nonlegislative in nature. See, Hutchinson v. Proxmire, 443 U.S. 111, (1979) (Speech or Debate Clause inapplicable to congressional dissemination of information through press releases or news letters); Gravel v. United States, 408 U.S. 606 (1972) (Speech or Debate Clause held inapplicable to an arrangement for private publication of the "Pentagon Papers"); Vander Jagt v. O'Neill, 699 F. 2d 1166, 1171 n. 9 (D.C. Cir. 1983) ("... it is at least debatable whether partisan organizational actions of the Democratic caucus should be immunized...") (dictum).

Three district courts have also decided the question presented here inconsistently. The district court in this action, Agromayor v. Colberg, 573 F. Supp. 939 (D.C.P.R. 1983) determined Respondant's act to be a "peripheral" and "tangential" activit[y]... not be confused with the legislative core."

Id at 943. In Visser v. Magnarelli, 542 F. Supp. 1331 (N.D.N.Y. 1982), the district court held that a city counsel's vote to not rehire an individual, simply because he was a member of the opposing political party was not legislatively immune from constitutional claims filed under 42 U.S.C. §§ 1983 and 1988. A third district court, however, Heiar v. Crawford, 558 F. Supp. 1175 (W.D. Wis. 1983) held that county officials who passed a resolution forcing plaintiffs, three former deputy sheriffs, to retire early, were "absolutely immune from suit under 42 U.S.C. § 1983 for alleged constitutional violations stemming from legislative acts." Id at 1181. The question central to all of these decisions --- What is a legislative act for purposes of legislative immunity? --- though remains unsatisfactorily answered.

The Speech or Debate "Clause has been read 'broadly to effectuate its purposes,' ... and includes within its protections anything 'generally done in a session of the House by one of its members in relation to the business before it'". Doe v. McMillan, 412 U.S. 306, 311 (1973) (quoting Kilbourn v. Thompson, 103 U.S. 168 (1880). The reach of the clause, however, is not all encompassing. The fact that legislators "perform certain acts in their official capacities... does not necessarily make all such acts legislative in nature." Gravel v. United States, 408 U.S. 606, 624-25 (1972). Legislative immunity is limited to officials who "ac[t] in a field where legislators traditionally have power to act," Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (federal common law immunity held applicable to investigative acts of state legislative

committee); see, Nixon v. Fitzgerald, 457 U.S. 731, 767 n. 2 (1982) (White, J. joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (dictum) ("... a personnel decision allegedly made for unlawful reasons... does not fall within the... legislative... functions to which absolute immunity attaches"). Legislative immunity applies only to acts that constitute "an integral part of the deliberative and communicative processes" of a legislature. Gravel v. United States, supra at 625.

Respondent's refusal to authorize the hiring of Petitioner is an act clearly outside the sphere protected by legislative immunity. To characterize it as "'legislative' in character.... is to stretch the meaning of the word beyond sensible proportion." Walker v. Jones, supra at 931.

II

PETITIONER HAS BEEN DENIED RIGHTS GUARANTEED TO HIM BY THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS AND BY 42 U.S.C. § 1983.

The circumstances of this case establish that Petitioner's rights to freedom of association and belief, and freedom of the press, guaranteed to him by the First Amendment, through the Fifth and Fourteenth Amendments,[4/] have been violated. The facts of this case also establish violations of the due process and equal protection clauses guaranteed Petitioner through the Fifth and Fourteenth Amendments.

Mr. Colberg's refusal to authorize the

4/ Plaintiff's complaint is predicated on both the Fifth and Fourteenth Amendments because the "precise question [as to] whether the guarantee of equal protection is provided to Puerto Ricans under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment," has never been resolved. Examining Board v. Flores de Otero, 426 U.S. 572, 601 (1976).

hiring of Mr. Agromayor because he wrote an editorial that described Respondant's political party as being divided,[5/] is precisely the type of politically-motivated employment decision, that this Court has held is inconsistent with the First and Fourteenth Amendments. See, Elrod v. Burns, 427 U.S. 347 (1976) (discharge of employees because they were not members of the Democratic Party held violative of the First and Fourteenth Amendments); Branti v. Finkel, 445 U.S. 512 (1980) (assistant public defenders threatened with discharge, because they were Republicans was constitutionally prohibited).

5/ Even if one were to assume that Mr. Colberg did not hire Mr. Agromayor because Mr. Colberg thought that Mr. Agromayor's editorial was defamatory, we think it worth noting that Mr. Colberg never filed an action for defamation.

Petitioner has stated valid claims for relief[6/] because Mr. Colberg, in effect conditioned the public employment Petitioner sought, on the constitutionally impermissable requirements that Mr. Agromayor be loyal to Respondent's party, and that he refrain from criticizing Mr. Colberg's party publicly. The imposition

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6/ Petitioner submits that the First Circuit failed to follow this Court's mandate, that lower courts are required to construe, when passing on motions to dismiss, based on the lack of subject matter jurisdiction or, failure to state a cause of action, a pleader's allegations, in the light most favorable to him or her. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The First Circuit appears to have read Petitioner's allegations in the least favorable light, infra, pp. 7a-10a and 20a-24a, in spite of the fact that Respondent never moved to dismissed the complaint below for failure to state a cause of action or, failure to state a claim upon which relief can be granted. Respondent's dismissal motion was based on other grounds having nothing to do with the adequacy of the Petitioner's claims. See, Agromayor v. Colberg, 573 F. Supp. 939, 940 (D.C.P.R. 1983).

of such prerequisites, however, are constitutionally infirm because they are in no way related to the effective performance of the job Petitioner sought. Branti v. Finkel, supra at 518. Indeed, the reverse is true. The prerequisites effectively imposed by Respondent on Petitioner in this case only deprived Representative Granados of his right to hire an individual that shared his political views and who professed loyalty to his party, requirements that were necessary to the effective performance of the job. The conditions imposed here are inconsistent with the First and Fourteenth Amendments. Cf., Shelton v. Tucker, 364 U.S. 479 (1960); Keyeshian v. Board of Regents, 385 U.S. 589 (1967) (nonrenewal of non-tenured public school teachers' contracts cannot be constitutionally conditioned on the exercise of First and Fourteenth Amendments rights).

Petitioner's claim based on national origin is also valid and cognizable under law. Mr. Agromayor is a citizen of the United States. Respondent's refusal to hire him on the ground that he was born in Argentina is violative of his right to equal protection. No legitimate interest of the Commonwealth of Puerto Rico is served by requiring that Mr. Agromayor be a native-born Puerto Rican. Defendant's action is, therefore, constitutionally repugnant. Cf., Hernandez v. Texas, 347 U.S. 475 (1954). Public employers have substantial discretion to establish qualifications for its employees, however, it is clear that such qualifications must be rationally related to legitimate state interests. See, Sugarman v. Dougall, 413 U.S. 642 (1973); cf., Takahashi v. Fish Comm'n, 334 U.S. 410 (1948). No such interest exists here to

justify the invidious discrimination that Petitioner has suffered.

CONCLUSION

WHEREFORE, petitioner prays that the petition for writ of certiorari be granted and that the Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review its judgment.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 83-1825

MANUEL AGROMAYOR,

Plaintiff, Appellee,

v.

SEVERO COLBERG,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

(Hon. Juan R. Torruella, U.S. District Judge)

[573 F. Supp. 939]

Before

Bownes, Aldrich and Breyer,

Circuit Judges.

Marcos A. Ramirez Lavandero, with whom Marcos A. Ramirez, and Ramirez & Ramirez were on brief, for appellant.

Maria H. Sandoval, with whom Harvey B. Nachman, and Law Offices of Nachman & Fernandez Sein were on brief, for appellee.

July 5, 1984

ALDRICH, Senior Circuit Judge. This action for compensatory and punitive damages involves three questions: appealability; the meaning and effect of a legislative rule relating to hiring and discharge of legislative employees, and legislative immunity. The rule caused plaintiff to lose an opportunity for employment as a legislative press officer. He brought suit under 42 U.S.C. § 1983, and defendant moved to dismiss on the basis of absolute legislative immunity.[1/] The motion was denied, and defendant appeals. We reverse.

In March, 1983, plaintiff, a journalist, a member of the New Progressive Party, applied to Representative Granados-Navedo, the minority leader of the Puerto Rico House of Representatives and also a member of the

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1/ This opinion speaks only in terms of such immunity. Qualified immunity remains for another day.

New Progressive Party, for employment as a House "press officer." Granados was willing, but to effect the employment he was required to submit plaintiff's name to defendant Colberg, the President of the House. Rule VII of the House provided as follows.

RULE VII
EMPLOYEES OF THE HOUSE OF REPRESENTATIVES

1. The permanent employees of the House will be designated by the President and will perform their functions during the term of each Legislative Assembly. The President may, at any moment, deem terminated the term for which any employee was employed when in his (or her) judgment such termination is necessary for the convenience of the service, and he (or she) will name a corresponding successor.

2. Temporary employees is the service of the House will be named in the same manner as permanent employees.

3. The President may discipline the employees and will be empowered to suspend them from their jobs by reason of their failure to comply with their duties. In such a case, the suspended employee will receive no salary or remuneration whatsoever

and the President may name a substitute employee, and will inform the House on its following session.

Defendant was a member of the Popular, the other leading party. Before he had acted on Granados' request, plaintiff published an article in a San Juan newspaper, attacking the Popular Party, and defendant in particular. Defendant published a response in another newspaper, and wrote Granados that because of the defamatory nature of plaintiff's attack on his person, and even more on the respectability of the House, he did not consider him "morally fit" to be a press officer, and would not effect his employment.

In his complaint plaintiff alleged that defendant's refusal to designate him for employment, (1) interfered with his freedom of association; (2) interfered with his freedom of speech and of the press; (3) discriminated against him because of his

national origin, and (4) deprived him of a property interest in a job without due process. The parties stipulated to four exhibits: plaintiff's newspaper article; defendant's newspaper article; defendant's letter to Granados stating his reasons for not executing plaintiff's contract, and Rule VII. The court telescoped the complaint into one sentence, that plaintiff was refused "because of what he had written in a [newspaper] article and because he was not a Puerto Rican." After a discussion, post, it overruled defendant's immunity defense.

1. Appealability

Before considering the merits, we address the challenge to our appellate jurisdiction. Ordinarily, of course, the denial of a motion to dismiss is not an appealable "final decision" under 28 U.S.C. § 1291. See Switzerland Cheese Ass'n, Inc.

v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966); Securities & Exchange Comm'n v. Sloan, 535 F.2d 679, 681 (2d Cir. 1976), cert. denied, 430 U.S. 966. It is now well settled, however, that where an order serves permanently to deny important collateral rights of a litigant, the order may be immediately appealable. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949); United States v. Sorren, 605 F.2d 1211, 1213 (1st Cir. 1979). The Court has applied this doctrine to pre-trial denials of absolute immunity, reasoning that, if the immunity exists, it is intended not only to relieve defendants from liability, but also "from the burden of defending themselves." See Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979); see also Flanagan v. United States, 52 U.S.L.W. 4201, 4203 (U.S. February 21, 1984); Nixon v. Fitzgerald, 457 U.S. 731, 741-43 (1982). This intent would

be unprotected if a defendant must wait until after trial to appeal. Accordingly, we have jurisdiction to determine now whether defendant is entitled to immunity, at least if he presents a plausible claim thereto. We hold that he has done this.

2. The claims.

Turning to the merits, before considering what, under section 1983, is at issue, we note what is not. We agree with the district court's short summation, ante, omitting mention of count (1), freedom of association, and (4), deprivation of property without due process. As to count (1), there is no allegation that plaintiff was refused employment because of his political party, but only that because of defendant's refusal, plaintiff lost a party opportunity. There can be no affirmative right to employment on the basis of party

membership. Plaintiff would confuse incidental consequences of defendant's action with actuating purpose. If this reasoning were sound, every time a man, say, is given a job, rather than a woman, no amount of evidence of superior qualifications would suffice because the bottom line would be that the woman was rejected. Count (1) does not state a 1983 cause of action.

Nor, as to count (4), can there be a property interest in a contract not yet received. Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972). Even a cursory look at the rule's broad compass refutes plaintiff's allegation that it merely makes the President a rubber stamp, so that plaintiff had an agreement with Granados that created a property interest. The legislators' functions can be delegated, and nothing in the rule indicates that anything

less than a full delegation was intended, or that the hiring task is any different in the hands of the President. We will not go beyond the plain language to inject ourselves into the internal workings of the legislature.

As to the balance of the complaint, we must deal with the speech and national origin claims as they relate to legislative immunity. We note, with respect to count (3), that although the written exhibits give little if any support to the claim that plaintiff was refused a position because of his nationality of origin, let alone that it was a determinative factor, the complaint asserts, and for the purpose of the motion it accordingly must stand admitted, that defendant told Granados orally that he declined both because of the newspaper article, and because plaintiff was not a native Puerto Rican. At the same time,

we remark, in passing, that it would be only with great difficulty, in light of the written record, that we could imagine plaintiff able to meet his requirement of showing that, but for his Argentinian birth, defendant would have been willing to designate his employment. Cf. Mount Healthy City School District v. Doyle, 429 U.S. 274, 283-84 (1977).

3. The immunity.

The Supreme Court has long recognized that state legislators, when acting "in the sphere of legitimate legislative activity," enjoy a federal common law absolute immunity from suit under section 1983. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-32 (1980); Tenney v. Brandhove, 341 U.S. 367, 376 (1951). This immunity is

based on the need for an independent legislative branch, free from the coercion of restraint imposed by inquiry from other governmental authority, as well as from the time consuming problem of legislators having to defend their official acts in court. See Tenney, ante, 341 U.S. at 373-78; cf. United States v. Doe, 455 F.2d 753, 758 (1st Cir. 1972), vacated on other gr'ds sub nom. Gravel v. United States, 408 U.S. 606 (1972). Although, unlike the constitutional immunity for Congressmen, the immunity is not based upon the separation of powers, principles of comity and federalism also enter in the balance. United States v. Gillock, 445 U.S. 360, 370-73 (1980).

The scope of "legitimate legislative activity subject to immunity, however, is

ill-defined.[2/] The immunity has never applied to every activity undertaken by a legislator while in office, but only to those functions significantly related to legislating. In decisions regarding the Constitution's Speech and Debate Clause, the test has been stated as whether the challenged activities were "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with

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2/ If we were to seek guidance of Congressional intent from Title VII, 42 U.S.C. § 2000e et seq., Congress expressly exempted from the definition of "employee[s]" covered by that act,

"any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff.... 42 U.S.C. § 2000e(f).

respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). At the same time, although the common law immunity and the Speech and Debate Clause immunity have common roots in old English law, see Tenney, ante, 341 U.S. at 372-78, decisions construing the Clause do not necessarily define the boundaries of the section 1983 immunity. Cf. Supreme Court of Virginia v. Consumers Union, ante. The district court resolved this question as follows:

"In the case at hand, Colberg submits that the activity of hiring legislative employees is essential for the 'due functioning of the legislative process', and that nothing is more important for the proper development of the legislative process than the hiring of legislative personnel. We can agree with the Defendant

on both points. Nonetheless, we believe that the Defendant was acting in an administrative capacity not necessarily considered part of the traditional role of a legislator. The hiring of personnel cannot be qualified as an integral or necessary element of the deliberative and communicative process of the legislature protected by legislative immunity. When the Speaker is hiring personnel, he is neither legislating nor formulating legislation. See Davis, [Davis v. Passman, post] supra, at 880. Peripheral or tangental activities of a representative must not be confused with the legislative core. We, therefore, do not find Colberg protected in this matter by the absolute legislative immunity which he invokes." (footnote omitted).

This is an interesting analysis, but we feel it contains an element of inconsistency. To the extent that an employee's

function is "essential to the legislative process, his qualifications, and, hence, his proper selection, should be correspondingly essential.[3/] The question we must answer is, to what extent should a legislator be immune from judicial inquiry in determining those essential qualifications?

The Supreme Court has not decided whether the employment of legislative assistants is a legislative act subject to immunity. In Davis v. Passman, 544 F.2d 865, 878 (5th Cir. 1977), rev'd en banc on other gr'ds, 571 F.2d 793, rev'd, 442 U.S. 229, the Fifth Circuit addressed whether a United States Congressman could be sued under the Fifth Amendment for firing a

---

3/ We were never satisfied with Senator Hruska's response, to the objection that a certain nominee for the Supreme Court was second rate, that the country's second raters were entitled to representation.

female aide, allegedly because of her sex. The panel held, inter alia, that the firing of a legislative aide was not a "legislative" act subject to absolute constitutional immunity. It reasoned that the employment of legislative aides simply was not integrally related to the process of developing and enacting legislation. The Fifth Circuit, en banc, reversed on other grounds, holding that no private right of action should be inferred from the Fifth Amendment. The Supreme Court reversed the en banc decision, but did not reach the question of the Congressman's immunity. Four dissenters thought the question should have been addressed, and at least three felt that the Congressman should be immune:

"A Member of Congress has a right to expect that every person on his or her staff will give total loyalty to the political

positions of the Member, total confidentiality, and total support. This may, on occasion, lead a Member to employ a particular person on a racial, ethnic, religious, or gender basis thought to be acceptable to the constituency represented, even though in other branches of Government -- or in the private sector -- such selection factors might be prohibited....

....

"At this level of Government -- staff assistants of Members -- long-accepted concepts of separation of powers dictate, for me, that until Congress legislates otherwise as to employment standards for its own staff, judicial power in this area, is circumscribed." Davis v. Passman, ante, 442 U.S. at 249-50 (Burger, C.J., dissenting). While this opinion spoke for only three members of the Court, the others did not

contradict it, but merely chose not to reach the question. We believe that, at least to a considerable degree, that opinion expressed a proper common law concern beyond strict speech and debate or comparable immunity that courts should exhibit towards legislators, state or federal.

Of course not all employment raises a legislative interest. We agree with the court in Walker v. Jones, F.2d (D.C.Cir. 1984), that the position of House restaurant manager has no "meaningful input" with regard to the legislative function, such that the hiring or firing of that employee could be considered a "legislative" act. However, an employee dealing with "the deliberative and communicative processes," Gravel, ante, 408 U.S. at 625, must be of direct legislative importance. Cf. id., at 616-17 ("[I]t is literally impossible, in view of the complexities of the modern

legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of Congress to perform their legislative tasks without the help of aides and assistants; ... the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos....") Additionally, in applying the immunity we decline to inquire deeply into the functions performed by a particular personal legislative aide, inasmuch as such an inquiry itself threatens to undermine the principles that absolute immunity was intended to protect. Personal aides may perform a variety of tasks, only some of which are vital to the legislative process. The position at issue here is both ill-defined and open-ended, and not readily categorized as "legislative" or "non-legislative." However, we see enough opportunity

for "meaningful input" into the legislative process such that the employment decision should be immunized.[4/]

4. Count 2 - Freedom of Speech

We have no possible problem with Count 2, plaintiff's complaint that defendant's failure to hire him inconstitutionally interfered with his freedom of speech.

4/ Coordinate the relations between Representative Granados-Navedo and the other members of the New Progressive Party delegation in the House of Representatives with the press of the Island; coordinate the press conferences with these members and provide all the orientation and technical services in the defined areas; and, such other functions that Representative Granados-Navedo entrusts him to perform."

If there is a seeming underlying conflict here between plaintiff's proposed duties and defendant's being the one, under the rule, to effect the employment, this is a legislative matter, not our concern.

First, we would draw a substantial distinction between discharge from employment, cf. Connick v. Myers, 51 U.S.L.W. 4436 (U.S. April 20, 1983); Pickering v. Board of Educ., 391 U.S. 562 (1968), and original selection. Even with respect to discharges, a government employer has considerable leeway to base his decision on potentially disruptive speech. See Connick, ante. He should have far greater discretion to refuse employment because an applicant's expression of views indicates the possibility of such disruption. We are, indeed, startled at the concept of awarding damages on the theory that it is an unconstitutional abridgment of plaintiff's right to free speech to take into consideration his choice of speech when weighing his qualifications for legislative employment. There are few areas of government employment where a

person's choice of speech and beliefs would be so legitimately important. Are you looking for legislative employment? Under plaintiff's rule, exercise your speaking "rights" in a way that you know will be found personally, or professionally distateful, and, at the least, you have a lawsuit.

Legislators must have broad freedom of choice. We will not hold that the general, non-specific language of section 1983 sanctions judicial inquiry into the comparative rights of legislators to choose compatible employees and the freedom of applicants for employment to have expressed their views prior to employment.

5. Count 3 - national origin.

Plaintiff's allegations that he was denied the position because of his Argentinian birth are more troublesome. It would

be plausible, perhaps, to have the absolute legislative immunity, given an applicant to which it would be applicable, depend upon some criteria and not others. Nonetheless, we recognize, as did the Passman minority, that a legislator has a legitimate interest in the background as well as the other qualifications of his assistants. Indeed, we could take judicial notice that this is a constant concern. A legislative employee may have relations with the legislator's public that render characteristics even in a sense collateral to the employment nevertheless of substantial importance. And once an employment position falls within the class in which a legislative right of choice is to be recognized (barring outright patronage, or mere party affiliation, no way here involved, and as to which we express no opinion), it would effectively destroy the immunity if factual inquiry and judicial

resolution were to be made as to the legislative wisdom. We cannot feel that there should be a judicial employment office in charge of legislative hiring.

Reversed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1825

MANUEL AGROMAYOR,
Plaintiff, Appellee,

v.

SEVERO COLBERG,
Defendant, Appellant.

JUDGMENT

Entered: July 3, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court reversed.

By the Court:

FRANCIS P. SCIGLIANO,
Clerk.

(cc: Ms. Sandoval and Messr. Ramirez)

By: Richard W. Gordon
Chief Deputy Clerk

Constitutional Provisions

Article 1 Section 6, Clause 1:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government of a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit equity, or other proper proceeding for redress.

[TRANSLATION]

RULE VII

EMPLOYEES OF THE HOUSE OF REPRESENTATIVES

1. The permanent employees of the House will be designated by the President and will perform their functions during the term of each Legislative Assembly. The President may, at any moment, deem terminated the term for which any employee was employed when in his (or her) judgment such termination is necessary for the convenience of the service, and he (or she) will name a corresponding successor.

2. Temporary employees in the service of the House will be named in the same manner as permanent employees.

3. The President may discipline the employees and will be empowered to suspend them from their jobs by reason of their failure to comply with their duties. In such a case, the suspended employee will receive no salary or remuneration whatsoever

and the President may name a substitute employee, and will inform the House in its following session.

United States District Court
For the District of Puerto Rico

— CERTIFIED —
To be a correct translation made
and/or submitted by the interested party

Lauren M. García

Certified Court Interpreter
Administrative Office of the
United States Courts

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Translation of Article Which Appeared in the Puerto Rican Newspaper, El Mundo, "Opinion" Section, March 15, 1983

"He Who Laughs Last"

Manuel Agromayor

The Populares are very happy these days. And not without reason, considering the problem individuals on the other side have on their hands.

All this jubilation, though, may be a little bit premature. In the long run -- a long run that may wind up being very short -- the governmental aspirations of Dr. Hernán Padilla may cause within the PPD [Popular Democratic Party] a commotion of dimensions equal to or larger than the one being presently provoked within the PNP. [New Progressive Party]

The formerly monolithic Popular Party is in reality, at this stage, composed of two parties, which are together but not united. On the one side are the self-named commonwealthers; that is, those that defend the classic and orthodox ELA [the Commonwealth of Puerto Rico], exactly as it came into being in 1952 and as it has remained since then. Aligned on the other side are those who call themselves autonomists; that is, those who wish to follow the highway laid out by the New Thesis and who wish to reach, as soon as possible, the goal of an associated republic.

Just a few days ago, a prominent Popular leader in an "off the record" comment to a colleague -- a colleague of mine, not his -- not only recognized this situation but predicted that, after the

victory they expect in 1984, "pieces will fly" (sic) within the Popular Party.

Professional secrecy bars me from naming the long-time leader. But so that you have an idea, I shall tell you that [the source] is the President of one of the two legislative bodies, and, so as not to implicate Miguel Hernández Agosto, who has nothing to do with this, I will tell you that he is not the one [I am referring to.]

Supposedly, Rafael Hernández Colón is the candidate representing both factions. But it has become more difficult for him to maintain this thorny duality and, the pressure being exerted on him, from one or the other factions, to define his position and abandon the dangerous practice of swimming in two waters, is becoming greater.

And this is where Hernán Padilla, probably much to his regret, is making it easy for the autonomists within the PPD and for the Carlistas within the PNP.

The more Hernán Padilla insists on presenting himself as an option above and beyond the apparently sterile debate that revolves around the issue of status, the more he will appear to be similar to the Hernández Colón, who smiles at the commonwealthers, the conservatives, and at those persons who wish to keep everything as it is.

Put another way, the Popular candidate has in Padilla a dangerous competitor. The only way of averting the danger [presented] -- and this is not my opinion, but that of the Popular autonomists -- is to return to

the strategy of 1980. To regain the sympathy of the separatist groups. To resume a militant position regarding status which opposes statehood.

This strategy, though, will, naturally, alienate the pro-commonwealth groups. They will come to realize that ideologically, they are closer [in their thinking] to Padilla's than they are to Hernández Colón's. And they will follow him. [Padilla]

We will not discuss here who has a majority, the PNP's or the Populares. Many believe they are at an even par with one another, in any case, we shall find that out on the evening of November 6, 1984. What one can say, at this point, and with certainty, is that the statehooders have a

majority over the commonwealthers, the autonomists, and, the separatists.

If the next election turns into a race among three [candidates] the candidate who marshalls [the largest number of votes] from the four contingents I have just mentioned, will have to win.

In that case, Carlos Romero Barceló, in spite of all the obstacles will obtain a renewal, for four additional years, on the lease the people of Puerto Rico granted him so that he could live at Fortaleza [the Governor's mansion.]

For this, he will have to be more grateful to Hernán Padilla than to anyone else.

There is reason then why the saying which goes, he who laughs last, laughs better, came into being.

United States District Court
For the District of Puerto Rico

[illegible]

James M. Garcia

[illegible]
Clerk of the
United States Courts

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Translation of Article Which Appeared in the Puerto Rican Newspaper, El Reportero, March 19, 1983

"Agromajorities..."

By Severo E. Colberg

For a legitimate reporter, the pen or the typewriter he uses to write should be objects of veneration, as one or the other are central to a writer's liberty, which is [a freedom] much greater than the freedom of the press. These mediums, which are used to communicate ideas, should never be used as objects [traded in] commerce, sellable to the highest bidder. He who sells what he writes, sells his soul. What is written [in this way] loses all of its worth and credibility. Money charged [for writing of this kind] converts itself into stolen receipts and credibility turns into deceit and extortion.

I never charge, not even one penny for

my writings, be they good or bad. Writing is for me a necessity, therapy, and when I write, I say what I feel, not what I am told to say in exchange for some miserable dollars. I am not referring, of course, to professional journalists for whom I have the utmost respect but to those pseudo-independent columnists who in reality are columnists employed [and] paid by political parties. This is the way it is with Manuel Agromayor, undercover agent for the annexation movement within the El Mundo newspaper [a statement which] -- I presume -- surprises the good faith of the management of that newspaper.

The most recent feat of this notorious NPP agent is, "He Who Laughs Last," published in El Mundo last March 15th. In this assimilationist-roasting, Agromayor points to me as the "long-time leader" that anticipates a supposed division within the

Popular Party. He purposes to have a great professional secret -- of the profession of selling goods? -- that points me out as the person who told a colleague of his that after our victory in 1984, "pieces will fly in the Popular Party."

In the first place I deny [saying] such a thing. And, second, I authorize Agromayor to make public the name of the colleague he alludes to, so that he can show that he is a true newspaperman. Because, in this case Agromayor is as much a liar as the alleged "colleague" on whom he relies to spread this [rumor] invented by an annexationist-agitator who is paid by funds belonging to the New Progressive Party. With respect to what I just stated, that of being a paid journalist, I offer evidence [and challenge him] to attempt to deny it.

Let us first examine who this

"independent" columnist for El Mundo is. Agromayor is Argentinian by nationality, born in Buenos Aires, however, he has nothing of the gaucho in him, much less the stuff that Martin Fierro was made of. It would not strike me as odd, due to his NPP-assimilation [to find out] that during the conflict over the Falkland Islands he took the side of England and the United States [and] against his mother country. A mercenary writer is capable of doing anything.

As one would expect, like all aliens who arrive in Puerto Rico, with or without American citizenship -- Agromayor became an American citizen -- he attempts to earn a living, an endeavor which is legitimate if done with honesty and decency and without trying to deceive anyone.

Agromayor chose another path

and decided to sell his talent to the New Progressive Party. He has dedicated himself to writing articles against the Popular Party and, particularly, with the most mercenary gluttony, against Rafael Hernández Colon. For such efforts he has received the sum of $5,000.00 -- exactly -- which the New Progressive Party paid him during the electoral campaign of 1980. Subsequently, after August 1, 1981, he signed a contract with Angel Viera Martínez during that period [when Viera] was President of the House of Representatives, to assist the Speaker of the House, José Granados-Navedo, while being given an annual compensation of $13,200.00, paid to him for working 4 hours a day, from 1:00 p.m. to 4:00 p.m., during work days.

In exchange for the $13,200.00

Agromayor prepared releases for the [printed] press, radio and television, analyzed informative material and prepared files. These [duties] are confirmed by the monthly statements prepared by him of which there are only three. This [fact] in itself constitutes a violation of the contract which called for monthly statements.

For distinct activities performed by him, he uses different names: Manuel Agromayor; Manuel E. Roque Agromayor; Manuel Agromayor Canellas and Manuel Ernesto Agromayor. Which one is the true one? Let him tell us.

I present all of these personal details for two reasons: first, to prove the truth of what I am saying; second, so that the Populares and other persons who innocently and in good faith have believed this man to be an independent columnist, know that he is

a writer and official propagandist of the annexation movement, who is paid by the NPP.

For all of the statements I have made here, I have written proof, copies of which I have submitted, on a confidential basis to the management of El Reportero. If Mr. Agromayor believes he can contradict all of this evidence or a part of it, I challenge him to do so. He will see he cannot, because contrary to his lies, deceits and fantasies, my statements are supported by documents which contain the handwritten signature of Mr. Agromayor.

With respect to the rest of his [newspaper] article I state the following: The Popular Party is one [and] indestructible. At times we fight internally and fiercely, but we are not capable of destroying the house that Luis Muñoz Marín constructed for all Puerto Ricans. The Populares are not

like Agromayor's Republican-NPP's. Finally, I assure him, that contrary to the title of his own article, the last will not laugh at all; and the NPP majority that Mr. Agromayor dreams of for 1984, will continue being exactly that: an "agromajority"...

United States District Court
For the District of Puerto Rico

--- CERTIFIED ---
To be a correct translation made and/or submitted by the interested party

Laura M. Garcia

Certified Court Interpreter
Administrative Office of the
United States Courts

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[Translation]
Commonwealth of Puerto Rico
HOUSE OF REPRESENTATIVES
CAPITOL
San Juan, Puerto Rico 00901
[Printed
Seal of Puerto Rico]

Severo E. Colberg Ramírez
President

March 24, 1983

Hon. José Granados Navedo
Speaker
New Progressive Party
House of Representatives
Capitol
San Juan, P.R.

Dear Mr. Speaker:

I am sorry I cannot agree to sign the contract for services recommended by you in favor of Mr. Manuel Agromayor.

In recent days, specifically, in an article published in "El Mundo" -- a copy of which accompanies this letter -- Mr. Agromayor makes certain imputations against me which, as I stated publicly

in a reply I published in El Reportero, are so false as to be infamous.

I do not question the right of any employee of the House, which is equal to the right of any other private citizen, to write in favor of the party of his preference. But I find lies and vicious defamation intolerable, in spite of all the years in which I have been the victim of this type of mal-intended and vile personal attack.

The lack of credibility, seriousness, objectivity and ulterior motives evident in Mr. Agromayor's articles, especially, the disrespectful and false imputations made against me, constitute a grave lack of respect for the respectable institution of the Presidency of

the House of Representatives, even more than it does to my personal integrity.

For the reasons indicated above, I return to you the proposed contract, unsigned, since I do not consider Mr. Agromayor morally capable of lending his services as a reporter, newspaperman and lecturer in the House of Representatives.

My personal regards.

Cordially,

[signature of Severo E. Colberg Ramirez]

SEVERO E. COLBERG RAMIREZ

United States District Court
For the District of Puerto Rico

— CERTIFICATE —

To be used in connection with motions made
and/or submitted by the interested party

Laura M. García

Certified Court Interpreter
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FILED
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CLERK

No. 84-557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANUEL AGROMAYOR,

Petitioner,

v.

SEVERO COLBERG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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14 pp

QUESTION PRESENTED

Was the Puerto Rico Speaker's refusal to approve the hiring of a press official for the minority members of the House, who would have had a meaningful input into the legislative process, a legislative act, absolutely immune from suit under 42 U.S.C. sec. 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-557

MANUEL AGROMAYOR,

Petitioner,

v.

SEVERO COLBERG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents respectfully request this Court to deny the petition for certiorari in the exericse of its discretionary jurisdiction.

STATEMENT OF THE CASE

Respondent Severo Colberg (hereafter "Colberg"), Speaker of the House of Representatives of the Commonwealth of Puerto Rico, is charged by Rule VII of the Rules of the House (Pet. 31a), approved by that body under powers delegated by Article III, section 9 of the Constitution of Puerto Rico,[1] with

---

[1] "Each house . . . shall adopt rules for its own proceedings appropriate to legislative bodies."

the responsibility of making all employment decisions for the House. Acting under these powers, he refused to hire petitioner Manual Agromayor (hereafter "Agromayor") as a press officer and advisor to the minority members of the House. The complaint, whose factual allegations must be accepted in the procedural posture of this case, alleges that Colberg's action was motivated by a newspaper article written by Agromayor and by the latter's Argentinian origin.

Agromayor brought an action under 42 U.S.C. § 1983 against Colberg in the United States District Court for the District of Puerto Rico. Colberg filed a motion to dismiss which, *inter alia,* justified dismissal on the ground of the common law doctrine of absolute legislative immunity. The District Court overruled this defense under the theory that Colberg's action was peripheral or tangential to the legislative core, unprotected by legislative immunity.

On appeal, a unanimous panel of the First Circuit (Aldrich, S.J., Bownes and Breyer, JJ.) reversed. In an opinion by Senior Judge Aldrich, the First Circuit held that Agromayor's proposed duties would provide him "enough opportunity for 'meaningful input' into the legislative process such that the employment decision should be immunized." (Pet. 19a-20a).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Question Left Open In *Davis v. Passman* Should Not Be Decided In A Suit To Which No Federal Legislator Is A Party.

We must agree with petitioner that the question presented is substantially similar to that left open by this Court in *Davis* v. *Passman*, 442 U.S. 228, 235 n.11 (1979) (hereafter "the *Passman* issue"). However, that fact, standing alone, does not necessarily require its adjudication in this case. On the contrary, the facts and posture of this case counsel against its selection by the Court as the vehicle for the resolution of the *Passman* issue.

This Court has closely followed its holdings under the Speech or Debate Clause of the Federal Constitution, Art. I, sec. 6, in its decisions expounding the common law absolute legislative immunity of state legislators. See *Tenney* v. *Brandhove*, 341 U.S. 367, 372-379 (1951); *Lake Country States* v. *Tahoe Planning Agency*, 440 U.S. 391, 403-405 (1979); *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731-734 (1980). As pertains to federal *civil* suits against state legislators, this Court has identified no difference in practice or in theory in the scope of the immunity accorded them vis-à-vis that of their federal counterparts:

> "Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States* v. *Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia* v. *Consumers Union*, 446 at 733.

The fact that the immunity from civil suit of state legislators may mirror that of Congressmen, however, does not mean that this Court should render a path-breaking decision in the realm of legislative immunity in a suit concerning the former and not the latter. This Court has never done this before. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), followed *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880), and *McGrain* v. *Daugherty*, 273 U.S. 135 (1927), not vice versa. By the same token, *Supreme Court of Virginia, supra*, followed *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). And this is as it should be. From the federal standpoint, it is the immunity of Congressmen which holds paramount importance. The Speech or Debate Clause should be interpreted with an eye toward protecting the day-to-day functions of Congressmen; that is to say, the particular functional characteristics of Congress must be studiously analyzed first. Only after this is done and the scope of the Clause expounded, may such a holding be transported to the state level, if applicable. To follow the opposite route could imperil the effectiveness of the Clause and its protection of Congressional functions.

As petitioner recognizes (Pet. 8 n.*), pending before this Court is a petition for certiorari involving a Congressman's decision to fire a Congressional employee. *Jones* v. *Walker*, No. 84-529, filed October 2, 1984. This fact, however, does not mean, as petitioner seems to imply, that the cases present issues so closely connected as to require consolidation or joinder.

The *Jones* case does not present the precise issue left open in *Passman*. It involves the firing of the

manager of the House's restaurants. Unlike *Passman*, and also unlike the case at bar, *Jones* does not involve a legislative employee with meaningful input into the legislative process.[2] It would be difficult to imagine how Ms. Jones would ever be protected derivatively herself by legislative immunity. It is readily apparent that Ms. Davis and petitioner Agromayor would be so protected in many instances. See *Gravel* v. *United States*, 408 U.S. 606, 616 (1972); *Doe* v. *McMillan*, 412 U.S. 306, 324 (1973); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507 (1975).

II. There Is At Present No Conflict Between The Courts Of Appeals Which Necessitates The Intervention Of This Court At This Time.

Petitioner claims that the decision below resolved the *Passman* issue in a way which conflicts with the decisions of the Fifth (*Davis* v. *Passman*, 544 F.2d 863 (1977), *rev'd en banc on other grounds*, 571 F.2d 793 (1978), *rev'd*, 442 U.S. 228 (1979)) and District of Columbia (*Walker* v. *Jones*, *supra*) Circuits. We disagree.

The Fifth Circuit panel's divided decision in *Passman* should no longer be considered of precedential value in that Circuit after its reversal *en banc*, albeit on other grounds. Only one of the judges reached the *Passman* issue in the *en banc* decision. See 571 F.2d at 802 (Jones, J.). Moreover, the panel deci-

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[2] The District of Columbia Circuit expressly recognized this and also expressly reserved the *Passman* issue for another day. *Walker* v. *Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984).

sion was rendered before this Court considered the case and without the benefit of the views of three Justices. That leaves only the District of Columbia Circuit to contend with.

As previously discussed, the District of Columbia Circuit's *Jones* decision is readily distinguishable from the First Circuit's *Agromayor* decision as pertains to the nature and functions of the office involved. As a matter of fact, both Circuits view the nature and functions of the office denied or vacated as decisive for purposes of the legislative immunity inquiry. Compare Pet. 13a-20a with *Walker* v. *Jones*, 733 F.2d at 930-932.[3] Their analytical framework is identical, as shown by Judge Aldrich's agreement with the D.C. Circuit both as to its analysis and result. (Pet. 18a).

Thus, instead of a conflict between the Circuits, careful analysis of the decisions shows conclusively that there is wholehearted agreement between the only two Circuits whose consideration of the *Passman* issue has not been mooted by subsequent events.

This Court's intervention at this time is not warranted. The views of other Circuits regarding the *Passman* issue should be awaited before its definitive resolution by this Court.

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[3] Moreover, the only Fifth Circuit judge who addressed the legislative immunity issue in the *en banc Passman* decision agreed that this is the relevant analysis. See 571 F.2d at 802 (Jones, J.).

III. The First Circuit's Approach To The *Passman* Issue Is Correct And Petitioner Does Not Challenge This.

Last, but not least, we submit that the decision below is correct. It held that the hiring of an employee whose duties will meaningfully affect the Legislature's deliberative and communicative processes is of direct legislative importance such that the employment decision should be immunized. (Pet. 11a *et seq.*).

To that effect, petitioner does not argue before this Court that in the job he sought in the Commonwealth's House he was not to have "enough opportunity for 'meaningful input' into the legislative process." (Pet. 19a-20a). Instead, to support his conclusion that the federal courts are entitled to step in, petitioner relies on the fact that the Puerto Rico House has delegated the final hiring decision to its Speaker. According to petitioner, the hiring decision is no longer immunized if not taken personally by the legislator for whom the hired employee is going to work. In other words, petitioner's only argument is that notwithstanding whatever input the prospective employee might hav on the legislative process, the decision as to his recruitment is not immunized simply because the Puerto Rico House decided to entrust its Speaker and not the individual Representative with the final hiring decision. (Pet. 15 *et seq.*).

The Court of Appeals quite properly disposed of petitioner's thesis when it stated that the hiring scheme of the Puerto Rico House "is a legislative matter, not our concern." (Pet. 20a). The operative, unchallenged and controlling fact in this case is that the job petitioner sought in the Puerto Rico House

had a meaningful input into its legislative process. Accordingly, the Court of Appeals properly ended the judicially directed inquiry into the Speaker's decision, so as not to unduly impinge on his legislative prerogatives. See *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 511 (1975).

To summarize, this is not a case that merely rests on the issue left open in *Passman.* Petitioner does not challenge the way the First Circuit has approached that query, *i.e.*, that the decision to hire or fire legislative employees who have a meaningful input into the legislative process, is immune. Simply, petitioner disagrees with the way doctrine has been applied by the Court of Appeals to the particular hiring scheme adopted by the Puerto Rico representatives. He does not even inquire whether such scheme is or is not disseminated through the state legislatures before asking this Court to entertain his case.

As before the Court of Appeals, petitioner has failed to explain here why the representatives' decision to entrust their Speaker with the final hiring decision should make him less immune than his colleagues.

CONCLUSION

The petition for certiorari should be denied in the exercise of this Court's discretionary jurisdiction.

Respectfully submitted, this 2nd day of November, 1984.

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